MALAYSIAN REPORTS

Minister for Home Affairs, Malaysia & Anor v Karpal Singh

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 20 OF 1988
ABDUL HAMID AG LP, HASHIM YEOP A SANI AND HARUN SCJJ
18 AND 19 JULY 1988

Administrative Law – Habeas corpus – Application for order of habeas corpus – Detention order issued by Minister – Grounds for detention order – Allegations of fact – Alleged error in allegation of fact – Whether this renders detention invalid – Whether objective or subjective test applies – Whether subjective satisfaction of Minister is subject to judicial review

Preventive Detention – Application for writ of habeas corpus – Detention order issued by Minister – Grounds for detention order – Allegations of fact – Alleged errors in allegation of fact – Whether this renders detention invalid – Subjective satisfaction of Minister not subject to judicial review – Internal Security Act 1960, s 1

The respondent in this case had been placed under detention by virtue of a detention order issued by the Minister of Home Affairs under s 8 of the Internal Security Act 1960. The order of detention, grounds of detention and allegations of fact were served on the respondent. The respondent claimed that he had been unlawfully detained. It was alleged that one of the allegations was made in error as the respondent had not at the date, time and place alleged spoken on the issue of appointing non-Mandarin qualified headmasters and senior assistants in the national-type Chinese primary schools. The learned trial judge ordered that the writ of habeas corpus be issued and the respondent released (see [1988] 1 MLJ 468). The Public Prosecutor appealed.

Held, allowing the appeal: (1) The learned judge in this case would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact suppplied to the detainee. In particular, he failed to recognize that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. The learned judge therefore clearly misdirected himself.

(2) Whether there is reasonable cause for the making of the detention order is something which exists solely in the mind of the Minister of Home Affairs and he alone can decide it and it is not subject to challenge or judicial review unless it can be shown that he did not hold the opinion which he professed to hold.

(3) In this case the Minister of Home Affairs had gone on affidavit to say that omitting the allegation of fact complained against, he would still have made the detention order having regard to the reports and the information relating to the conduct of the respondent upon which no doubt the rest of the allegations of fact were based. The learned judge was bound to accept these averments in the affidavit and could not inquire into the cause of the detention.

(4) The flawed sixth allegation of fact was an error of no consequence which can be regarded as a mere surplusage especially in view of the affidavit of the Minister of Home Affairs. The subjective satisfaction of the Minister of Home Affairs is not subject to judicial review.

Cases referred to
1 *Tan Boon Liat* v *Menteri Hal Ehwal Dalam Negeri* [1976] 2 MLJ 83 (refd)
2 *The Zamora* [1916] 2 AC 77,
3 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 (folld)
4 *Liversidge* v *Anderson* [1942] AC 206 (folld)
5 *Inspector General of Police* v *Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (folld)

Legislation referred to
Internal Security Act 1960 s 8(1)

Appeal from: Criminal Application No 54-1-88 (High Court, Ipoh)

Ng Aik Guan (Deputy Public Prosecutor) for the appellant.
Respondent in person.

Cur Adv Vult

Abdul Hamid Ag LP (delivering the judgment of the court): In the High Court at Ipoh the respondent sought an order of habeas corpus. The respondent claimed that he had been unlawfully detained under an order of the Minister of Home Affairs dated 18 December 1987 made under s 8(1) of the Internal Security Act 1960. After hearing the application and arguments, the learned judge (Peh Swee Chin J) granted an order directing that the respondent be released. The appeal is against that order. The order of detention concerned reads as follows:

> Internal Security Act 1960
> Detention Order
> (Section 8(1))
>
> To: Superintendent
> Protected Detention Place Taiping
>
> Inspector General of Police
> Bukit Aman – Kuala Lumpur
>
> To all officers of Royal Malaysian Police
> and all other persons concerned.
>
> 'That I, being satisfied that this order is necessary, make against the person mentioned below with an intention of preventing the said person from acting prejudicial to:
>
> (a) the security of Malaysia,
> (b) x x x x x
> (c) x x x x x
>
> | Name | Identity Card Number |
> |---|---|
> | Pen/1282 – Karpal Singh s/o Ram Singh | 1836865(B) |
>
> And that in exercising the powers conferred upon me under s 8(1) of the Internal Security Act 1960, I, the Minister of Home Affairs, Malaysia, direct with this order that the person whose name is stated above be detained for a period of two years effective from 19 December 1987 at Protected

Detention Place Taiping or any other place as directed by me from time to time.

Made on 18 December 1987.

Dr Mahathir Bin Mohamad
Minister of Home Affairs
Malaysia

(Bil Khedn R 205/1182/4–)
6560

The grounds for the detention order read as follows:

That since the year 1980 until the date of arrest on 27 October 1987 you, Karpal Singh s/o Ram Singh, have been involved in activities that would incite racial sentiments amongst the multi-racial community of this country. These activities of yours could lead to an atmosphere of tension and enmity among the races in this country and endanger the security of the country.

The particulars of the charges read as follows:

(1) On 29 February 1980 while speaking in a dinner party at Silaiton Restaurant no 4636, Jalan Pantai, Butterworth, Pulau Pinang, organized by the Democratic Action Party Bagan Jermal Branch, you alleged that the government is only interested in one race and stressed liberty for and rights of other races.

(2) On 11 January 1982 at an emergency meeting of the Democratic Action Party, Penang State which was held at no 123-D, Jalan Batu Lancang, Pulau Pinang, you alleged that the rights of studying one's mother tongue of non-Malays is obstructed by the government by implementing the 3M curriculum. At the same meeting, you also alleged that the interests and fundamental rights of Chinese and Indians are not safeguarded and requested the public especially parents to oppose the implementation of the 3M curriculum in the Chinese and the Indian primary schools.

(3) On 2 March 1986, at a gathering in the compound of Kuan Im Temple, Pitt Street, Pulau Pinang, you quoted the case of Sim Kie Choon and Datuk Mokhtar Hashim to incite a clash between the Malays and the Chinese.

(4) On 16 August 1986, at a forum organized by the Democratic Action Party, Pulau Pinang, which was held at Kelab Ilham, no 225, Jalan Macalister, Pulau Pinang, you accused that the New Economic Policy is only in favour of one race ie the bumiputras only.

(5) On 5 September 1987, while speaking at the Arumugam Pillai Hall, Jalan Kulim, Bukit Mertajam, Pulau Pinang, you alleged that the Malaysian Chinese Association (MCA party) and the Gerakan Rakyat Malaysia had sold the fundamental rights of non-Malays to United Malay National Organization (UMNO).

(6) On 10 October 1987, at a gathering in front of Tuanku Syed Putra, Lebuh Downing, Pulau Pinang, you used the issue of appointing non-Mandarin qualified headmasters and senior assistants in the national type Chinese primary schools to incite racial sentiments of the Chinese community.

The basic grounds for the grant of the order of habeas corpus by the trial judge were set out by him in his grounds of judgment as follows:

First, it would render a dead letter, the statement of the law contained in Abdoolcader J's passage, supra.

Secondly, it would set a precedent and open the floodgates to other cases in future to all other detaining authorities to plead similarly, thereby effectively causing the three exceptions set out by Abdul Hamid CJ aforesaid to cease to exist altogether, the three exceptions having evolved by the dictates of justice over a long period of time through the cases.

Thirdly, there is considerable force in the submission that the Minister must be satisfied at the time of making the detention order, and not later as to its necessity for the same.

Fourthly, it would be open to the apparent objection or criticism later that it would amount to condoning an authority re-exercising his discretion to relate back to his prior order of deprivation of some other person's liberty when the original exercise of his discretion culminating in the prior order has been found to have been affected materially by a factual error, however unintentional or innocent the error may be.

It is interesting but not essential for the court's decision to refer to the detainee's submission that allegation of fact no 6 was the straw that broke the camel's back; I understood him to mean that allegation of fact no 6 has played a crucial part in the Minister's exercise of his otherwise non-justiciable discretion or satisfaction in making the detention order. I think the detainee has struck a chord. Most of the whole nation could not have been oblivious to or could have failed to watch the issue of non-Mandarin speaking headmasters mentioned in the allegation of fact no 6 being bandied about, first in amazement, then with horror and finally with a fairly audible sigh of relief on hearing the Prime Minister's announcement on the floor of Parliament of the mass arrests and banning of public rallies.

To revert to the matter at hand, on the second ground about the erroneous allegation of fact no 6 being outside the scope of the Act, the applicant also succeeds.

I therefore order the issue of the writ of habeas corpus to have the applicant brought up before the court to be set at liberty. The applicant is therefore to be released and discharged forthwith.

They may be summarized as follows. Firstly, the trial judge considered that not to grant habeas corpus would render negatory what was enunciated in *Tan Boon Liat* v *Menteri Hal Ehwal Dalam Negeri*.[1] The other grounds are:

(1) The Minister must be satisfied at the time of making the detention order and not later.

(2) Secondly, and which is closely related to the first, the Minister should not be allowed to relate back to his satisfaction.

(3) Thirdly, the trial judge concluded that allegation of fact no 6 played a 'crucial part' in the making of the detention order.

The learned judge thought that he found support for his view in the following passage at p 84 in the judgment of Abdoolcader J in *Tan Boon Liat*:[1]

I held in my judgment in *Yeap Hock Seng* v *The Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279, that although the courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to

see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense foreign thereto, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed (*Rameshwar Shaw* v *District Magistrate, Burdwan & Anor* AIR 1964 SC 334).

With all due respect to the learned judge, he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognize that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. The learned judge clearly misdirected himself. It was so when he said that:

> The issue of mala fides raised resolves itself in the final analysis into a simple and neat question: was the detention order in this case made without care, caution and proper sense of responsibility?

His whole approach to the question was in error when he proceeded to apply an objective instead of a subjective test.

As a result of this misdirection, the learned judge failed to recognize the true issue before him. The true issue before him was simply this: what was the effect of a flaw in one of the six allegations of fact. Had he appreciated the true issue before him, it would have been crystal clear to him that the passage in the judgment in *Re Tan Boon Liat* had nothing to do with the case before him.

As to his other grounds for granting the order of habeas corpus, they can be answered by going back to first principles. Since *The Zamora*[2] courts have come to accept that the best judge of what national security is is the authority which has the charge of security, ie the government. Lord Parker said in that case at p 107:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

The learned judge quoted from the judgment of Ong CJ in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*[3] the following passage:

> As I am given to understand, such vagueness or ambiguity should be regarded by this court as intrinsic evidence – apart from criticisms of the grounds and allegations of fact supplied to the appellant – showing that the decision of the cabinet had been made without the care and consideration that is essential where an order is made in good faith. In this connection want of good faith, of course, means no more than that, in the serious matter of depriving a citizen of his liberty without trial, there was absence of care, caution and a proper sense of responsibility. On this interpretation of mala fides there is no difference of opinion. If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the cabinet or the minister concerned had been 'satisfied'. On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all which could be required for the issue of an order based on subjective satisfaction. In the final analysis, the issue is one of fact.

The omitted first sentence in the above passage is highly material for, without it, a true appreciation of what Ong CJ meant to convey is not possible. That sentence reads as follows:

> Proceeding next to question the validity of the order, learned counsel argued that the order itself was defective ex facie in that it was expressed to have been made 'with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia/the maintenance of public order therein/the maintenance of essential services therein'.

Clearly Ong CJ's observations were made in the context of the submission that s 8 of the Internal Security Act allows a person to be detained on four grounds, that the order of detention stated three grounds in the alternative, that the grounds supplied to the detainee stated only one ground, that consequently this showed a casual and cavalier attitude on the part of the detaining authority and that in turn showed that the detaining authority had not given the matter adequate consideration and so the order of detention was invalid and the detainee's detention unlawful. It can be seen that Ong CJ was therefore not concerned with the question which confronted the learned judge in the present case which was: where the detaining authority has relied on a number of allegations of fact and at the hearing one of them is conceded by the detaining authority to be unsustainable, can that by itself be sufficient to render the detainee's detention unlawful?

It would seem that the learned judge in this case failed to recognize that Ong CJ went on to say in the next paragraph of his judgment as follows:

> In my view, when dealing with a question of fact, it will not do to wear blinkers, or to read the words of the order as strictly as one would construe an Act of Parliament or a penal or taxing statute. The grounds on which the detention order was made must be read in their proper context. The allegation, in categorical terms, was that since 1957 the appellant had consistently acted in a manner prejudicial to the security of Malaysia. In the same paper itself were set out a series of allegations of fact. They indicate with unmistakable clarity that over a number of years till 1964 (when the appellant left these shores, a fact admitted in his own affidavit) the appellant followed a certain pattern of conduct and that since he reappeared on the Malaysian scene in

March 1967 he had lost no time in involvement with the labour dispute in Bukit Asahan. After his detention he elected for a considerable time to make no representation against the detention. Taking all this into consideration, can it be said that he was ever in the dark about what, in truth, was the sole and substantive ground for his detention or that he was so embarrassed, through ignorance of the ground for his detention, that he was unable to make proper representations? This is a question of fact which the learned trial judge found against the appellant. Mine is a concurrent finding. Having so found I would treat the irrelevant grounds as immaterial surplusage. The appellant was not, for a moment, misled nor was he ever prejudiced thereby in any way. For my part, I see no reason to put such a strict construction on wording that the surplusage – nothing more than a technical defect – should be held to invalidate the order.

In our view the crux of the matter here is whether the learned judge in the present case took the correct approach to the question posed before him and has been time and again followed by the courts in this country (see *Liversidge* v *Anderson*[4] followed in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*[3] and *Inspector General of Police* v *Tan Sri Raja Khalid bin Raja Harun*[5]). In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold. In the present case the Minister filed an affidavit dated 27 January 1988 which, inter alia, contained the following:

3. From the reports and information relating to the conduct and activities of the applicant that I received from the police, I was satisfied that his detention was necessary with the view to preventing him from acting in a manner prejudicial to the security of Malaysia. Accordingly I made an order directing that he be detained for a period of two years with effect from 19 December 1987. A copy of the said detention order is annexed herewith and marked as exhibit 'MM 1'.

5. With regard to the allegation of fact no 6 in para 8 of the applicant's affidavit, I admit that the applicant was not present at the said gathering. It was due to an oversight on the part of the said Ibrahim bin Mamat to have stated otherwise in the allegations of fact served on the applicant. However, from the reports and the information relating to the conduct and activities of the applicant that I received from the police, I was satisfied, notwithstanding that he was not present at the said gathering, that it was necessary to detain him with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. It would not make any difference whether or not he was present at the said gathering having regard to the allegations of fact no 1, 2, 3, 4, and 5, taken as a whole.

7. With regard to para 14 of the applicant's affidavit in particular sub-paras (v), (vi), (vii), (viii), (ix), (x) and (xv), I deny that there was any misapprehension on my part of the correct situation, that there was a total failure to apply my mind to the facts of the case or that I have in any way acted mala fide in making the said detention order against the applicant. I considered very carefully the facts of the applicant's case and only after I was satisfied that his detention was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia that I made the said detention order directing that he be detained for a period of two years.

8. With regard to para 14(xiv), I state that his detention is still necessary with the view to preventing him from acting in a manner prejudicial to the security of Malaysia

The Minister of Home Affairs had gone on affidavit to say that omitting the allegation of fact he would still have made the detention order having regard to the reports and the information relating to the conduct of the respondent upon which, no doubt, the rest of the allegations of fact were based. In our view the learned judge in this case was bound to accept these averments in the affidavit and could not inquire into the cause of the detention. This is where the learned judge had erred, for notwithstanding the affidavit, the learned judge did in fact inquire into the cause of the respondent's detention. The learned judge plainly erred in applying an objective as opposed to a subjective test, contrary to the authorities cited when he concluded:

> Viewed objectively, and not subjectively, the error in all the circumstances would squarely in my view amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form. The applicant should therefore succeed on this ground alone.

In passing we would like to point out that the so-called error with regard to allegation of fact no 6 is actually the result of confusion probably caused by the vagueness of the language used. It is clear from the affidavit of Ibrahim bin Mamat that the respondent was the chairman of the DAP, Penang, which organized the meeting referred to in allegation no 6. The Minister of Home Affairs must have known of this fact and the respondent cannot be said not to have known the true nature of the allegation. Therefore it is not altogether correct to say that allegation of fact no 6 is totally baseless.

In this regard we find a passage in the judgment of Suffian FJ (as he then was) in *Karam's* case[3] to be of direct relevance to the issue. It reads:

> In my judgment detention under an order of the Minister made under s 8 of the Internal Security Act is not illegal simply because the allegations of fact supplied to him in pursuance of art 151(1)(a) [of the Constitution] and s 11 of the Act are vague, insufficient or irrelevant. I do not see any justification for reading into the Constitution or into the Act any provision to the effect that any imperfection in the allegations of fact supplied to the detainee, relates, as it were, to the original order of detention, and goes to its root, so as to render illegal the detention.

To summarize we would hold that the flawed sixth allegation of fact was an error of no consequence which can be regarded as a mere surplusage especially in view of the

affidavit of the Minister of Home Affairs referred to earlier. The subjective satisfaction of the Minister of Home Affairs is not subject to judicial review.

Accordingly, for the above reasons we would allow the appeal and set aside the order of the trial judge.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Ram Singh v Bright Steel Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 434 OF 1986
LEE HUN HOE CJ (BORNEO), WAN SULEIMAN AND WAN HAMZAH SCJJ
15 AND 16 OCTOBER 1987

Labour Law – Overtime – Claim for – Appeal against decision of labour officer – Evidence unsatisfactory

In this case, the appellant was employed in 1976 and provided with accommodation. The terms of his employment were informal. He was provided with accommodation with the understanding that he kept an eye on the factory after office hours. He was dismissed in 1985 and until then he had not made any claim for overtime. Subsequently he claimed $213,939.87 for overtime. The claim was allowed by the labour officer but on appeal the learned judge of the High Court dismissed the claim. The appellant appealed.

Held dismissing the appeal: On the evidence, the appellant had not proved his case on the balance of probabilities. The learned judge was correct in holding that the evidence was unsatisfactory.

Case referred to

1 *Bonham-Carter* v *Hyde Park Hotel Ltd* (1948) 64 TLR 177 (refd)

Appeal from: Civil Appeal No 16-15 of 1986 (High Court, Kuala Lumpur)

Kevin G Danker for the appellant.
CV Das for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): The appellant was employed in 1976 and provided with accommodation. Until his dismissal in 1985, he had never made any claim for overtime against the respondent. The terms of his employment were rather informal. He was provided with accommodation with the understanding that he kept an eye on the factory after office hours. His mere presence would act as a deterrent.

He claimed $213,939.87. This is a staggering claim. He tried to show that he was on call round the clock. He is an illiterate. He relied on a record kept by his daughter (C1) covering a period of four days in 1985 of lorries coming in and out of the factory in a claim for a period of nine years. This record was admitted by the labour officer without the maker being called. Evidence shows that the appellant's wife used to help him in his work, eg whenever he slept or was occupied elsewhere. The labour officer never differentiated between work done by the appellant and his wife. The appellant could not claim for work done by his wife.

The respondent contended that the nature of the appellant's work involved long hours of inactivity or standby employment and by virtue of 60A(8) of the Employment Act 1955, the respondent was not obliged in law to pay for such work as claimed. The labour officer did not consider this.

While we appreciate that the proceedings before the labour officer were rather informal, nevertheless we expect the labour officer to act fairly, justly and impartially. The way he dealt with the matter made him appear to be a crusader rather than acting judicially. No reasonable tribunal would find that the appellant worked for 20 hours a day for nine years on the evidence before the tribunal.

Even though the procedure is informal, it is inconceivable that the labour officer would act on hearsay evidence. The application of the principle of natural justice does not mean that the labour officer could act on what is not evidence. It is, therefore, not surprising that the learned judge found that the evidence before the labour officer was unsatisfactory.

One is reminded of the words of Lord Goddard in *Bonham-Carter* v *Hyde Park Hotel Ltd* (at p 178):

> On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory.

This was what happened to the present case. The learned judge had found the evidence unsatisfactory. We agree with him. On the evidence, we have no doubt whatsoever that the appellant had not proved his case on the balance of probabilities. We see no reason to interfere with the learned judge's finding. We dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Zain & Co.*; *Shook Lin & Bok.*

Reported by *Prof Ahmad Ibrahim*